

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Plaintiff,

and

GREGORIO AGUILA, *et al.*

Plaintiffs-Intervenors,

v.

EVANS FRUIT CO., INC.

Defendant,

and

JUAN MARIN and ANGELITA
MARIN, a marital community,

Defendants-Intervenors.

NO. CV-11-3093-LRS

**ORDER RE
MOTION FOR
RECONSIDERATION,
*INTER ALIA***

BEFORE THE COURT is Plaintiffs' Joint Motion For Reconsideration Of Order Re Summary Judgment Motions (ECF No. 279). This motion is heard without oral argument. Plaintiffs ask the court to reconsider its April 19, 2013 order (ECF No. 256) which awarded summary judgment to Defendants (Defendant and Defendants-Intervenors) on the Title VII and WLAD retaliation claims asserted against them by Plaintiffs (EEOC and Plaintiffs-Intervenors).

**ORDER RE MOTION FOR
RECONSIDERATION, *INTER ALIA*- 1**

I. RECONSIDERATION STANDARD

A motion for reconsideration can only be granted when a district court: (1) is presented with newly discovered evidence; or (2) committed clear error or the initial decision was manifestly unjust; or (3) there has been an intervening change in controlling law. *Dixon v. Wallowa County*, 336 F.3d 1013, 1022 (9th Cir. 2003).

II. SIGNIFICANCE OF PRELIMINARY INJUNCTION

Plaintiffs contend the court's summary judgment ruling is inconsistent with the preliminary injunction it entered in October 2010 in CV-10-3033-LRS (the sexual harassment case). The court disagrees.

The retaliation case did not exist when this court issued the preliminary injunction. No retaliation claims were pending at that time and therefore, the court did not engage in the analysis for determining whether any claimant stated a *prima facie* case for retaliation (engaged in protected activity; thereafter subjected to action which a reasonable person would have considered adverse; and causal link between the protected activity and the adverse action). The court did not use this *prima facie* test to determine whether there was a likelihood of claimants succeeding on their retaliation claims because the injunction was issued in a case where the pertinent question was the likelihood of success on the sexual harassment claims asserted. The court instead found there were "serious questions" as to the validity of the sexual harassment claims and there was a fair chance the sexual harassment claimants would succeed on the merits of their claims, reasoning as follows:

Little to no evidence was presented at the hearing regarding the underlying sexual harassment/discrimination claims. Nevertheless, the court concludes Juan Marin was aware EEOC sexual harassment/discrimination charges had been filed against him beginning in 2006. The fact Angela Mendoza, the person who filed the charge in 2006, was present at the

February 10, 2010 meeting, along with at least one other charging party (Granados), reasonably suggests Cuenca and Rojas had been directed by Marin to go to the library in an effort to intimidate those who had already filed such charges and those who were considering filing such charges. Such action leads the court to conclude the Plaintiffs (EEOC and Elodia Sanchez) have at least a fair chance of succeeding on the merits of these claims and therefore, they are "fair ground for litigation" and for "more deliberative investigation."

(ECF No. 180 at p. 15).

During the preliminary injunction proceedings in CV-10-3033-LRS, the court did not consider the specific question of whether a reasonable person in the position of any meeting attendee would have considered materially adverse the presence of Cuenca and Rojas in the library. In turn, the court did not consider the important evidentiary issues which accompany that question and pertain to establishing the necessary causal link between protected activity and adverse action. These evidentiary issues were the focus of the court's summary judgment ruling on the retaliation claims and are again the focus during these reconsideration proceedings. Six of the ten future retaliation claimants testified at the preliminary injunction hearing in the sexual harassment case: Gregorio Aguila, Elodia Sanchez, Ambrocio Marin, Gerardo Silva, Cirilo Marin and Angela Mendoza. Hearsay testimony from these individuals at that time was admissible for the purpose of determining whether to issue a preliminary injunction, *The Republic of the Phillipines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988), but it was not their testimony which the court deemed critical in deciding to issue a preliminary injunction in the sexual harassment case.

At the preliminary injunction proceedings in the sexual harassment case, the question before the court was the likelihood that Juan Marin was monitoring those who alleged he had engaged in sexual harassment/discrimination of female employees and therefore, whether there was potential for intimidation of sexual

1 harassment claimants and witnesses. (ECF No. 180 at pp. 13-14).¹ The court
2 concluded the evidence established this likelihood, in particular because of the
3 testimony of Cuenca and Rojas (the two men Marin allegedly sent to the library to
4 monitor the Feb. 10, 2010 meeting), as well as of other individuals who did not
5 attend the library meeting (Simon Ramirez, Miguel Aguila Camacho and Eliseo
6 Aguila).² Not before the court, because there were no retaliation claims pending
7 at the time, was the question of whether any of the meeting attendees (the future
8 retaliation claimants in CV-11-3093-LRS) suffered an adverse action because of
9 engagement in protected activity. If that question had been before the court, the
10 court would have considered hearsay testimony from the meeting attendees
11 regarding their knowledge of post-meeting threats because the court is entitled to
12 consider such testimony in deciding a motion for a preliminary injunction.

13 The inference this court drew at the conclusion of the preliminary injunction
14 proceedings, that Marin directed Cuenca and Rojas to go to the library, does not
15 necessarily mean that a reasonable person would have found the presence of
16 Cuenca and Rojas in the library to be materially adverse in the absence of
17 admissible evidence linking the alleged post-meeting threat to Marin. This court
18 did not “change its mind” regarding the merits of the retaliation claims because no
19 retaliation claims had been pled and were before it at the time it issued its
20 preliminary injunction in the sexual harassment case. And in any event, a

21 ///

23 ¹ Five of the ten attendees at the meeting were current or future sexual
24 harassment claimants- Garcia, Granados, Sanchez, Valdez and Mendoza.

25 ² Whether or not some of the testimony of these individuals constituted
26 inadmissible hearsay was inconsequential because of the nature of the
27 preliminary injunction proceedings.

1 preliminary injunction does not constitute a decision on the merits of any type of
2 claim.

4 **III. CLAIMANTS OTHER THAN GREGORIO AGUILA**

5 Hearsay is any out-of-court statement, whether oral or written, offered in
6 evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(a), (c). In the
7 absence of a procedural rule or statute, hearsay is inadmissible unless it is defined
8 as non-hearsay under Fed. R. Evid. 801 or falls within a hearsay exception under
9 Fed. R. Evid. 803, 804, or 807. When a statement is hearsay within hearsay, or
10 double hearsay, each statement must qualify under some exemption or exception
11 to the hearsay rule. Fed. R. Evid. 805; *United States v. Arteaga*, 117 F.3d 388, 396
12 n. 12 (9th Cir. 1997).

13 The alleged threat at issue, and upon which all of the claimants rely,
14 originated with Gregorio Aguila. This threat was conveyed to Aguila by Alberto
15 Sanchez. Aguila relayed it to others, including his counsel (Ms. Rodriguez), and
16 to some of the other library meeting attendees.³ Even assuming the statement that
17 Sanchez made to Aguila qualifies under some exemption to the hearsay rule (i.e.,
18 it is a “verbal act” or it is a statement of a co-conspirator), or an exception to the
19 hearsay rule (declarant’s state of mind under FRE 803(3)), there also needs to be
20 an exemption or exception covering Aguila’s out-of-court statements relaying
21 Sanchez’s statement to others. It cannot merely be assumed that the exemption or
22

23 ³ Plaintiffs acknowledge there are two levels of potential hearsay involved,
24 referring to the “first hearsay issue” as Sanchez’s “threatening statements to
25 Gregorio Aguila,” and the “second hearsay issue” as “the other claimants’
26 statements about the threats they learned of from Mr. Aguila or counsel.” (See
27 Plaintiffs’ Reply Br., ECF No. 290 at pp. 5-6).

1 exception which may apply to the statement that Sanchez made to Aguila carries
2 over to subsequent statements made by Aguila to others and then to what those
3 others pass on to others. Just because the statement may constitute a “verbal act”
4 as between Sanchez and Aguila does not also mean it constitutes a “verbal act” as
5 between Aguila and whomever else he told about it (i.e. his counsel), and does not
6 continue to constitute a “verbal act” whenever whomever else (i.e., his counsel)
7 told about it to another (i.e., another claimant). Thus, Sanchez’s out-of-court
8 statement may be admissible as a “verbal act” as between Sanchez and Aguila, and
9 as such, Aguila, in support of his own retaliation claim, can testify to Sanchez
10 making it. The rest of the claimants, however, in support of their own retaliation
11 claims, cannot testify about Aguila’s or someone else’s out-of-court statement to
12 them about Sanchez’s out-of-court statement (alleged threat).

13 In a Washington defamation case, plaintiff testified that “A” stated that “B”
14 made an allegedly defamatory statement. The Washington Supreme Court held that
15 “B’s” statement was admissible as a “declaration in issue,” but that the plaintiff’s
16 testimony was nevertheless objectionable as hearsay because it repeated the out of
17 court statements of “A.” 5B Wash. Prac. Evidence Law and Practice §801.10 (5th
18 ed.), citing *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986). Here, what the
19 other claimants propose to do is testify that Aguila or their counsel or someone else
20 told them that Sanchez made the allegedly threatening statement. Sanchez’s
21 statement may be admissible as a “declaration in issue” or as a verbal act, but
22 testimony from the claimants about what Aguila or counsel or someone else told
23 them is objectionable as hearsay because it repeats the out-of-court statement of
24 Aguila or counsel or someone else as to what Sanchez purportedly told Aguila.

25 In accord is the holding in *U.S. Information Systems, Inc. v. International*
26 *Brotherhood Of Electrical Workers Local Union Number 3*, 2006 WL 2136249
27 (S.D.N.Y. 2006) at *12 (threats were hearsay because they were verbal acts and “if

1 Mr. Pinney had received the threats himself he could have recounted them, but he
2 was not the recipient”). Here, if Sanchez’s alleged threats constitute verbal acts as
3 to Aguila (discussed *infra*), Aguila can recount them without a hearsay issue in
4 support of his retaliation claim, but that does not mean all of the other claimants
5 can recount what Aguila or counsel or someone else told them without there being
6 a hearsay issue. This is because they were not “recipients” of the alleged threat.
7 The only “recipient” was Aguila.

8 Aguila’s or counsel’s or whoever else’s out-of-court statements to the other
9 claimants (repeating Sanchez’s out-of-court statement/ “threat”) are offered for the
10 truth of the matter asserted: that all of the meeting participants were threatened by
11 Sanchez and/or Marin. Admission into evidence of these out-of-court statements
12 cannot be justified on the asserted basis that the statements are offered to show the
13 effect on the listener, rather than the truth of the matter asserted. This is because,
14 as the court discussed in its summary judgment order (ECF No. 256 at pp. 8-9), the
15 subjective feelings of a retaliation claimant are irrelevant:

16 Unlike sexual harassment claims, there is no subjective
17 component to retaliation claims. Because of the
18 subjective component of a sexual harassment claim
19 (claimant perceived the working environment to be
20 abusive or hostile), out of court statements relayed to a
21 sexual harassment claimant regarding similar acts of
22 harassment in the workplace may be admissible for the
23 purpose of showing the effect on the listener (the
24 claimant). *Hawkins v. Anheuser-Busch*, 517 F.3d 321,
25 336-37 (6th Cir. 2008). Such statements are not hearsay
26 because they are not offered for the truth of the matter
27 asserted. Whether a retaliation claimant has been
28 subjected to a materially adverse action is evaluated by
a purely objective standard: a claimant must show that
a reasonable person would have found the challenged
action materially adverse, which means it might have
dissuaded a reasonable person from making or
supporting a charge of discrimination. The subjective
effect of a statement on a particular claimant is
irrelevant. The Title VII anti-retaliation provision’s
“standard for judging harm must be objective,” so as to
“avoi[d] the uncertainties and unfair discrepancies that
can plague a judicial effort to determine a plaintiff’s

1 unusual subjective feelings.” *Burlington Northern*, 548
2 U.S. at 68-69.

3 Notwithstanding the Supreme Court’s clear statement that subjective feelings
4 are irrelevant, Plaintiffs nevertheless assert that “the subjective understanding and
5 impact of the retaliatory acts by the subjects of those acts is a relevant inquiry.”

6 There is an additional problem with counsel having relayed the alleged
7 threat to claimants in that it is unclear exactly what counsel was told by Aguila
8 and, in turn, what counsel told the other claimants. As Defendants-Intervenors
9 point out (and which is not disputed by Plaintiffs), “counsel asserted the attorney-
10 client privilege to all questions about what Mr. Aguila conveyed to his attorneys
11 . . . and/or about what the attorneys conveyed to the other plaintiffs . . .,” and, “[a]s
12 a result, there will be no evidence whatsoever to prove that the other plaintiffs
13 [other than Aguila] ever ‘experienced’ and/or ‘knew about’ the threats supposedly
14 made against them.” (ECF No. 288 at pp. 11-12). This begs the question of how
15 defense counsel could be expected to effectively cross-examine any of these
16 claimants when it is unclear how they heard of the alleged threat from Sanchez and
17 exactly what they heard about the alleged threat. This is not merely a matter of
18 “weight” to be given to a claimant’s testimony, but rather the admissibility of that
19 testimony.

20 Plaintiffs lump Ambrocio Marin into the same category as all of the other
21 claimants in asserting he heard about the alleged threat from Aguila. As discussed
22 in the court’s summary judgment order, however, Ambrocio Marin’s situation is
23 somewhat unique:

24 Mr. Marin attended the library meeting and claims to
25 have seen Cuenca and Rojas. He apparently knew who
26 they were and about their association with Evans Fruit.
27 He did not see them taking photographs. On February
28 21, 2010, 11 days after the library meeting, Mr. Marin
listened in as Gregorio Aguila called a man on Mr.
Aguila’s cell phone whose voice Mr. Marin later
identified as that of Alberto Sanchez, a crew leader

1 employed by Evans Fruit at that time who worked under
2 the direction of Juan Marin. According to Mr. Marin, he
3 heard the voice say “not to worry that they knew what
they were going to do with Ambrocio and Cirilo.” There
was no specification of who “they” were.

4 (ECF No. 256 at p. 15).

5 In their motion for reconsideration, Plaintiffs do not single out Ambrocio
6 Marin for any unique analysis, notwithstanding his listening in on a telephone
7 conversation Aguila purportedly had with Alberto Sanchez.⁴ Presumably, this is
8 because the significance of the aforementioned telephone conversation wholly
9 depends on what Ambrocio Marin was told by Aguila about alleged threats being
10 made against library meeting participants and against himself (Ambrocio Marin)
11 specifically. (ECF No. 212-2, A. Marin Dep. at p. 135, lines 5-22). As discussed
12

13 ⁴ In the court’s summary judgment order, this was treated as a first level
14 hearsay issue (what Sanchez purportedly said during the telephone
15 conversation), instead of second level hearsay (what Aguila told Ambrocio
16 Marin), and the court found it did not qualify as non-hearsay under Fed. R.
17 Evid. 801(d)(2). (ECF No. 256 at pp. 15-16). The Plaintiffs do not engage in
18 that analysis with regard to what Ambrocio Marin allegedly overheard during
19 the telephone conversation, presumably because it was not clear the caller was
20 Sanchez, that what he said amounted to a threat, and that Juan Marin was
21 somehow involved. At the September 2010 preliminary injunction hearing in
22 CV-10-3033-LRS, Ambrocio Marin testified he never heard Alberto Sanchez
23 threaten anyone (ECF No. 171 at p. 300), and that he never heard a direct threat
24 from Juan Marin (ECF No. 171 at p. 302). Accordingly, with regard to
25 Ambrocio Marin, the issue involves second level hearsay and indeed, the
26 Plaintiffs treat it as such.
27

1 herein, when Ambrocio Marin repeats what Aguila told him, that is hearsay and is
2 inadmissible unless there is some exemption or exception apart from an exemption
3 or exception which might allow Aguila to testify about what was said to him by
4 Sanchez.

5 Besides hearsay, there is another issue with regard to claimant Francisco
6 Ramos and that is whether his attendance at the library meeting constituted
7 participation in “protected activity.” This court found it did not because he did not
8 attend as a “potential witness or claimant.”

9 He last worked at Evans Fruit approximately 20 years
10 ago and while employed there he did not witness any
11 alleged sexual harassment. He did no more than
12 accompany his wife, Angela Mendoza, to the meeting.
13 Mr. Ramos’ attendance at the meeting did not constitute
14 “participation” in protected activity. He does not fall
15 within the “zone of interests” protected by Title VII or
16 the WLAD. His situation is clearly factually
distinguishable from that involved in *Thompson v. N.*
America Stainless, LP, _____ U.S. _____, 131 S.Ct. 863
(2011) (after plaintiff’s fiancée filed a sex discrimination
charge against the defendant, their joint employer,
plaintiff was fired). Mr. Ramos’ interests are “unrelated
to the statutory prohibitions” of Title VII and the
WLAD. *Id.* at 870,

17 (ECF No. 256 at pp. 7-8).

18 Plaintiffs assert the court erred in finding Ramos did not fall within the
19 “zone of interests” protected by Title VII or the WLAD. Ramos clearly, however,
20 is not in the same situation as the plaintiff’s fiancée in the *Thompson* case. That
21 plaintiff was employed by the same company as his future wife when he was fired
22 because she filed a sex discrimination charge. Ramos had not been employed at
23 Evans Fruit in 20 years and he did not witness any sexual harassment while
24 employed there. During his deposition, he testified the “only” reason he went to
25 the library meeting was to “accompany” his wife, Angela Mendoza, (ECF No.
26 212-6, Ramos Dep. at p. 15, lines 20-22), that he was not going to provide any
27 information about sexual harassment, and that he was merely there to be supportive

1 of his wife. (*Id.* at p. 16, lines 2-7). Furthermore, contrary to Plaintiffs' assertion,
2 Ramos' deposition testimony is equivocal as to his presence at the meeting being
3 specifically requested by the EEOC. (*Id.* at p. 15, lines 12-19). In their motion for
4 reconsideration, Plaintiffs assert that "Ramos actually provided assistance to his
5 wife by facilitating communications between his wife and the EEOC investigator,"
6 but Plaintiffs do not cite any of the record in support thereof, and there is no
7 support for the same in the deposition of Ramos. The court did not "clearly err" in
8 finding that Ramos' attendance at the meeting did not constitute "protected
9 activity." Even if it did, however, as noted above, his contention that he was
10 subjected to a materially adverse action depends on inadmissible hearsay testimony
11 because Ramos repeats the alleged threat he was informed of by Aguila and/or his
12 (Ramos') counsel.

13 Because the out-of-court statements made by Aguila to his counsel and to
14 others, repeating Sanchez's statement, constitute inadmissible hearsay, the court
15 will not reconsider awarding judgment for Defendants on the retaliation claims of
16 Francisco Ramos, Angela Mendoza, Ambrocio Marin, Gerardo Silva, Aurelia
17 Garcia, Cirilo Marin, Elodia Sanchez, Norma Valdez and Wendy Granados. As to
18 these claimants, the presence of Cuenca and Rojas could only be "adverse" if
19 there is admissible evidence to establish the meeting participants' awareness of the
20 alleged threat made by Sanchez. There is no such evidence. Those claimants
21 cannot repeat what they were told by Aguila, their counsel, or by someone else
22 regarding the alleged threat. Accordingly, as to them, what remains is the mere
23 presence of Cuenca and Rojas in a public library. Furthermore, four of the
24 claimants were unaware of the presence of Cuenca and Rojas (Ramos, Garcia,
25 Cirilo Marin and Angela Mendoza); the majority of them did not know who
26 Cuenca and Rojas were (the exceptions being Aguila, Ambrocio Marin and

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Gerardo Silva); and only one of them (Aguila) alleges he saw Cuenca and Rojas taking pictures with a cell phone.⁵

IV. GREGORIO AGUILA

There are three issues with regard to Aguila: 1) did he engage in protected activity by attending the library meeting? 2) did Alberto Sanchez make a threat against him as opposed to threatening the other library meeting attendees? and 3) if Aguila was engaged in protected activity and there was a threat against him, is there admissible evidence to link that threat to Juan Marin and/or to Evans Fruit?

A. Protected Activity

In its summary judgment order, the court noted as follows:

The allegations made by Mr. Aguila regarding pre-library meeting interactions with Juan Marin are not remotely related to any “protected activity” on the part of Mr. Aguila concerning an EEOC investigation into charges of sexual harassment. Indeed, there is no evidence that prior to the library meeting, Mr. Aguila was aware of any allegation by his partner, Elodia Sanchez, that she had been sexually harassed by Juan

⁵ *Robinson v. Shell Oil Company*, 519 U.S. 337, 117 S.Ct. 843 (1997), and *Estrada v. Security Barricade, Inc.*, 2006 WL 753241 (W.D. Wash. 2006), cited by Plaintiffs, did not involve the evidentiary issues presented here. Plaintiffs seemingly recognize this, prefacing their discussion of those cases with the assertion that “[b]eyond the hearsay issues raised by Defendants, Evans Fruit tries to interpose a requirement that retaliation claimants directly observe or personally experience the retaliatory acts complained of to maintain an actionable claim.” (ECF No. 290 at p. 7). (Emphasis added). In *Robinson* and *Estrada*, there apparently was no evidentiary obstacle, as here, to causally linking the adverse action to protected activity.

1 Marin. The evidence indicates he was not aware of these
2 allegations until long after the library meeting when he
and Ms. Sanchez moved to California.

3 (ECF No. 256 at pp. 16-17).

4 Although the court did not specifically find that Aguila's attendance at the
5 library meeting did not constitute "protected activity" (that he did not attend the
6 meeting to talk about Juan Marin's alleged sexual harassment), Plaintiffs address
7 it in their motion for reconsideration.

8 In his declaration filed in advance of the September 2010 preliminary
9 injunction hearing in CV-10-3033-LRS (ECF No. 9-4 in CV-10-3033-LRS filed
10 June 17, 2010), Aguila recounted his problems with Marin, including that when he
11 first started working for Evans Fruit in 2008, Marin gave him paychecks not
12 bearing his name (Aguila's name); that Marin had him cash other Evans Fruit
13 checks made out to other names and return the money to Marin; that in early 2009,
14 Marin offered him \$20,000 to kill four people; that in March 2009, May 2009 and
15 November 2009, Marin offered to buy his (Aguila's) son; and how in June 2009,
16 Marin approached him and offered him \$500 to have sex with his (Aguila's)
17 partner, Elodia Sanchez. In his declaration, Aguila says he learned about the
18 February 2010 library meeting from Ambrocio Marin who told him he should go
19 to the meeting to discuss the problems he and Elodia Sanchez had with Juan Marin.
20 During his testimony at the preliminary injunction hearing, Aguila reiterated these
21 problems he had with Juan Marin (including the offer to buy his child and the offer
22 to pay for sex with Ms. Sanchez). (ECF No. 170 in CV-10-3033-LRS at pp. 24-
23 25). Plaintiffs note that during his July 2010 deposition, Aguila testified to
24 knowing that Marin harassed women, specifically that he would offer them money
25 in exchange for sexual favors. Aguila mentioned the names of a couple of women,
26 other than Elodia Sanchez, that he heard Marin offer money to in exchange for sex.
27 (ECF No. 280-2).

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1 Although the record indicates that Aguila was not at the February 2010
2 library meeting to complain about sexual harassment of Elodia Sanchez (because
3 he was not yet aware of her being harassed), the record does not allow the court to
4 conclude as a matter of law that Aguila's attendance at the meeting did not
5 constitute participation in any "protected activity." Arguably, a reasonable
6 inference can be drawn from the record that Aguila was present at the meeting, if
7 not to talk about sexual harassment of Elodia Sanchez, to talk about other things
8 which he reasonably perceived to be sexual harassment of her (Marin offering him
9 money to have sex with Ms. Sanchez), even if it was not.⁶ To establish that he
10 engaged in a protected activity, a plaintiff need only show that "[he] had a
11 'reasonable belief that the employment practice he protested was prohibited under
12 Title VII.'" *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978).

13 14 **B. Threat**

15 The court's summary judgment ruling on Aguila's retaliation claim was not
16 based on there not being a threat leveled against him by Alberto Sanchez. Instead,
17 this court's ruling more or less assumed Aguila had engaged in protected activity
18 (attending the library meeting) and that he was threatened by Sanchez, but that
19 there was no admissible evidence to link that threat to Juan Marin and the library
20 meeting. Yet, in its reconsideration response, Defendant Evans Fruit suggest that
21 while the comments relayed by Sanchez may have constituted a threat against the
22 nine other meeting attendees, they did not constitute a threat against Aguila
23 himself.

24
25 ⁶ In the summary judgment order, the court found this offer was among
26 Aguila's pre-meeting interactions with Juan Marin "which had nothing to do
27 with Title VII 'protected activity'". (ECF No. 256 at pp. 18-19).

1 In his declaration filed in advance of the September 2010 preliminary
2 injunction hearing in CV-10-3033-LRS (ECF No. 9-4 in CV-10-3033-LRS,
3 Paragraph 19), Aguila said Sanchez advised him over the phone on Feb. 11, 2010
4 (one day after the library meeting) as follows:

5 Alberto told me that they knew I had attended the meeting in
6 the library. He asked if I was involved in trying to cause Juan
7 Marin problems. I told him that I did not go to the library. He
8 said I was lying and that they had taken pictures of us in the
9 library with a cell phone. Alberto Sanchez said they knew that
10 Cerilo Marin (Juan Marin's brother) and Ambrosio Marin (Juan
11 Marin's cousin) had also been at the meeting and that they had
12 plans to take care of them. He said that they were going to get
even with anyone else that attended and cooperated. He also
said that they knew I was desperate for work and they were
going to give me some money and work but I had to report to them
what occurred in any future meetings. By "they," I understood
Mr. Sanchez to be referring to him and Juan Marin. This call
really upset me and I called the EEOC attorneys immediately.⁷

13 Evans Fruit asserts the statement from Sanchez is an "offer of work," and is
14 "not a threat or retaliatory." According to Evans Fruit, "[t]he statement is . . . not
15 a threat directed at Mr. Aguila" because "[a]t the time of the alleged statement,
16 Aguila's participation and cooperation were unknown to Sanchez and Marin."
17 According to Evans Fruit, "Sanchez did not threaten Aguila because he attended
18 the meetings." Rather, says Evans Fruit, "[e]ncouragement, suggestion, and even
19 persuasion is not a threat and is not retaliation."

20 Here again, the court cannot conclude as a matter of law that Sanchez's
21 statement was not a threat against Aguila. Arguably, Aguila could have reasonably
22 perceived himself to be included in the threat because at the time of the library
23 meeting, he intended to cooperate with the EEOC, even if that was unbeknownst
24 to Sanchez and Marin at that time. Arguably, a reasonable inference arises that

25 ⁷ This is the "threat" that counsel subsequently passed on to the other
26 meeting attendees/future retaliation claimants.
27

1 Aguila was among those who would be “taken care” of because he intended to
2 cooperate. That he intended to cooperate is confirmed by the fact he regularly was
3 in touch with the EEOC and his own counsel (Ms. Rodriguez) thereafter to report
4 on his various post-library contacts with Sanchez and Marin. (ECF No. 9-4 in CV-
5 10-3033-LRS, Paragraphs 20, 23 and 30).

6 7 **C. Hearsay**

8 Defendant Evans Fruit did not confine the hearsay issue to a single footnote
9 in its reply brief on summary judgment. In its opening brief on summary judgment,
10 Evans Fruit asserted that “the claimants attempt to bolster their claims with
11 inadmissible hearsay statements and mere suspicion” (ECF No. 192 at p. 1), and
12 that “[a]fter the library meeting, through multiple layers of hearsay, often from
13 counsel for claimants, the word was spread that threats were being made against
14 those at the library and that they were all in danger” (ECF No. 192 at p. 7). Evans
15 Fruit contended that this hearsay evidence was inadmissible and that it was
16 “singularly inappropriate of claimants’ counsel to represent to claimants that they
17 had been threatened in order to encourage them to file retaliation charges.” (ECF
18 No. 192 at p. 7).

19 Moreover, the hearsay issue was a prominent component of the motion of
20 Defendants-Intervenors for summary judgment (ECF No. 217) on the claims of
21 Plaintiffs-Intervenors. EEOC was not entitled to disregard the hearsay issue even
22 though its suit was against Evans Fruit only. Hearsay was an issue regardless of
23 whether the Plaintiffs-Intervenors were suing Juan Marin in their individual
24 capacities, or suing Evans Fruit as EEOC class members based on alleged threats
25 made by Marin. The importance of resolving these evidentiary issues prior to the
26 commencement of any trial was obvious at the time the court considered the
27 summary judgment motions and remains so now.

1 On summary judgment, Plaintiffs-Intervenors (not the EEOC) attempted to
2 justify admission of Sanchez's statements on the basis that they were not hearsay
3 under Fed. R. Evid. 801(d)(2)(D) because it was the admission of a party-opponent
4 in that Sanchez was an agent of Juan Marin. For the first time in the joint motion
5 for reconsideration, Plaintiffs contend Sanchez's statement to Aguila was not
6 hearsay because it was a "verbal act" or because it was the statement of a co-
7 conspirator pursuant to Fed. R. Evid. 801(d)(2)(E). For the first time, Plaintiffs
8 contend Sanchez's statement is admissible pursuant to Fed. R. Evid. 803(3),
9 statement of declarant's then existing state of mind.

10 Normally, a motion for reconsideration is not intended to provide a party
11 with another chance to make arguments it could have and should have advanced
12 the first go around. That said, the court will consider the evidentiary arguments
13 which Plaintiffs advance for the first time on reconsideration.

14
15 **1. Verbal Acts (Non-hearsay)- Fed. R. Evid. 801(c)**

16 "Hearsay" means a statement that the declarant does not make while
17 testifying at the current trial or hearing; and a party offers to prove the truth of the
18 matter asserted in the statement. Fed. R. Evid. 801(c). Statements that are "in
19 issue" or that have independent legal significance, are not hearsay. 5B Wash.
20 Prac., Evidence Law and Practice §801.10 (5th ed.). The "general notion is that
21 evidence of a statement that must be proved to establish a claim or defense is not
22 hearsay because its relevance does not depend upon its truth." *Id.* "The statement
23 is relevant simply because it was made." *Id.* "Evidence of the alleged statement
24 is evidence of a verbal act, an utterance that is itself an operative fact giving rise
25 to legal consequences. The statement is admitted to show that it actually occurred,
26 not for the truth of the statement's contents." *Adair v. Safeco Insurance Company*,
27 2010 WL 2079542 (D. Mont. 2010) at *4, citing *U.S. v. Pang*, 362 F.3d 1187, 1192

1 (9th Cir. 2004), and *Stuart v. UNUM Life Ins. Co. of Am.*, 217 F.3d 1145, 1154 (9th
2 Cir. 2000).

3 Plaintiffs contend Sanchez's alleged statement to Aguila is offered to prove
4 that Aguila was retaliated against by Juan Marin because of his engagement in
5 protected activity (his participation in the library meeting), and that Sanchez's
6 statement shows the causal link between engagement in that protected activity and
7 the presence of Cuenca and Rojas in the Sunnyside Library (the adverse action).
8 Plaintiffs contend the statement is offered for the mere fact it was made, not for its
9 truth.

10 With regard to Juan Marin, the statement is clearly offered for the truth of
11 the matter asserted: that "they" includes Juan Marin and the alleged threat was
12 made at his direction. The statement is not offered simply to show it actually
13 occurred. Plaintiffs are not just trying to establish a threat was made, but that it
14 was made at the direction of Juan Marin. Plaintiffs acknowledge what they seek
15 to prove through Sanchez's statement is Marin's involvement, not simply that
16 Sanchez made a threat. In other words, the alleged threat does not have
17 "independent legal significance." It does not have significance apart from the truth
18 of its content. Vis-a-vis Marin, it is not true the sole significance of the alleged
19 statement is that it was made. This is because the Plaintiffs must also somehow
20 link Sanchez's statement to Marin. Plaintiffs essentially acknowledged this in
21 their response to Evans Fruit's motion for summary judgment, asserting there was
22 "direct evidence that the adverse employment action was due to the protected
23 activity as the threats were directed at getting even with anyone who went to the
24 meeting or talked with the attorneys" and therefore, "the **content** of the threats
25 themselves state a causal link between the protected activity (attending the
26 meeting; talking to the attorneys) and the adverse employment action (getting even

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1 if you went to the meeting or talk to the attorneys).” (ECF No. 214 at p. 15)
 2 (Emphasis added).

3 On the other hand, it appears that what Sanchez said to Aguila is a non-
 4 hearsay verbal act to the extent it is considered solely for the purpose of evaluating
 5 Evans Fruit’s liability to Aguila for what Sanchez said to Aguila. In other words,
 6 Sanchez’s statement cannot be offered against Marin because in that context, it is
 7 offered for the truth of the matter asserted (that Marin was part of the “they”
 8 threatening the meeting participants). Vis-a-vis Sanchez, it can be offered against
 9 Evans Fruit on the basis that the mere fact it was uttered by him is of legal
 10 significance without regard to its truth. It has “independent legal significance”
 11 with regard to Sanchez, but not with regard to Marin.⁸

12 **2. Admissions of Party Opponent (Non-hearsay)- Fed. R. Evid.**

13 **801(d)(2)**

14 In its summary judgment order, the court restricted its analysis to whether
 15 Sanchez’s statement (alleged threat) could be attributed to Juan Marin so as to
 16 constitute an admission of a party opponent which is admissible non-hearsay. The
 17

18 ⁸ The same analysis applies to the alleged statement Sanchez made to Aguila
 19 during a March 8, 2010 telephone conversation: “Alberto told me in an angry
 20 voice that I should not testify or say anything because I knew what type of
 21 people I was dealing with.” (ECF No. 9-4 in CV-10-3033-LRS, Paragraph 23).
 22 This statement is inadmissible hearsay with regard to Marin because it is
 23 offered for the truth of the matter asserted because Plaintiffs seeks to link
 24 Marin to the statement: that Marin is one of “the people” Aguila is dealing
 25 with. It appears, however, that the statement qualifies as a non-hearsay verbal
 26 act to the extent Plaintiffs seek to use it to establish Evans Fruit’s liability to
 27 Aguila via Sanchez only.

1 court concluded Sanchez's statement was not admissible, reasoning as follows:

2 Even assuming this to be a threat that could conceivably
3 be linked to Juan Marin, and that it was indeed made by
4 Mr. Sanchez, it is inadmissible hearsay and cannot be
5 considered in determining whether a reasonable person
6 would have considered the presence of Cuenca and
7 Rojas in the library to be materially adverse. Fed. R.
8 Evid. 801(d)(2) provides that a statement is not hearsay
9 if it is offered against an opposing party and "(C) was
10 made by a person whom the party authorized to make a
11 statement on the subject; (D) was made by the party's
12 agent or employee on a matter within the scope of that
13 relationship and while it existed; or (E) was made by the
14 party's coconspirator during and in furtherance of the
15 conspiracy." Such a statement must be considered "but
16 does not by itself establish the declarant's authority
17 under (C), the existence of the relationship under (D); or
18 the existence of the conspiracy or participation in it
19 under (E)." The statement allegedly made by Mr.
20 Sanchez over the phone does not establish that he was
21 authorized by Juan Marin to make such a statement, and
22 does not establish that it was made by Mr. Sanchez as an
23 agent of Juan Marin within the scope of any agency
24 relationship which existed at that time between them.
25 Accordingly, the statement is not admissible against
26 either Juan Marin or Evans Fruit as opposing parties.
27 The mere fact that Mr. Sanchez was a crew leader for
28 Evans Fruit and Juan Marin was his foreman at the time
the statement was allegedly made (a fact Mr. Sanchez
testified to in conjunction with the preliminary
injunction hearing in CV-10-3033-LRS, ECF No. 172 at
p. 466), does not establish it was made pursuant to an
agency relationship that existed between them.⁹

(ECF No. 256 at pp. 15-16).

In their motion for reconsideration, Plaintiffs do not attempt to persuade the court that Sanchez's statement is a non-hearsay admission by a party opponent pursuant to 801(d)(2)(C)(made by a person whom the party authorized to make a statement on the subject) or (D)(made by the party's agent or employee on a matter

⁹ "The employee's station within the organization is not relevant to the Rule 801(d)(2) analysis," instead "[t]he relevant inquiry is whether the employee's statement was made within the scope of employment." *McDonough v. City of Quincy*, 452 F.3d 8, 21 (1st Cir. 2006).

1 within the scope of that relationship and while it existed).¹⁰ Instead, they now
2 contend it is a non-hearsay admission of a party opponent pursuant to 801(d)(2)(E)
3 (made by the party's coconspirator during and in furtherance of the conspiracy).
4 In other words, Plaintiffs assert Sanchez was Marin's coconspirator and therefore,
5 Sanchez's statement is admissible against Marin.

6 Coconspirator admissions may arise in civil cases. *Smith v. Bray*, 681 F.3d
7 888, 904-06 (7th Cir. 2012); *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257,
8 1267 (9th Cir. 1983). It appears it is not necessary that a civil conspiracy be pled.
9 In the criminal context, there is case law holding it is not necessary that a
10 conspiracy be charged in the indictment or pleadings. *United States v. Maldonado-*
11 *Rivera*, 922 F.2d 934, 962 (2nd Cir. 1990). As noted, Fed. R. Evid. 801(d)(2)
12 provides that the statement must be considered "but does not by itself establish .
13 . the existence of the conspiracy or participation in it." Independent evidence is
14 necessary to establish the existence of a conspiracy, its pendency, whether the party
15 against whom it was offered was a member (here, Juan Marin), and whether the
16 statement was made in furtherance of it. "This requirement can be satisfied by the
17 testimony of non-conspirators or by corroboration of facts contained in the
18 statements of the conspirators." *United States v. Petty*, 132 F.3d 373, 380 (7th Cir.
19 1997). The issues of the existence of a conspiracy, its pendency, whether the party
20 against whom it was offered was a member, and whether the statement was made
21 in furtherance of it, are for the court under Fed. R. Evid. 104(a). *Bourjaily v.*
22 *United States*, 483 U.S. 171, 175-76, 107 S.Ct. 2775 (1987). Preponderance of the
23 ///

24
25 ¹⁰ Sanchez's statement is not admissible against Evans Fruit as the admission
26 of a party opponent because it was not made within the scope of his
27 agency/employment relationship with Evans Fruit.

1 evidence is the standard of proof applied to these preliminary fact issues. *Id.* at
2 175.

3 In its summary judgment order, the court noted that Aguila indicated Juan
4 Marin had made certain statements to him following the alleged threat he received
5 from Alberto Sanchez on February 11, 2010. The court concluded these statements
6 by Marin were of no significance (even though admissible as admissions of a party
7 opponent pursuant to Fed. R. Evid. 801(d)(2)(A)- made by an opposing party “in
8 an individual or representative capacity”). The court reasoned as follows:

9 Mr. Aguila says that after the library meeting and his
10 encounters with the unidentified woman in the red truck,
11 Juan Marin “sent for me at the ranch and told me I was
12 his friend, that I should never betray him, that I should
13 never do anything against him, that I should never knife
14 him in the back. And laughing, he held himself and said
15 you know what I’m capable of; I can kill you.” Because
16 the statements made by Mr. Sanchez are inadmissible,
17 this alleged statement by Marin, which is admissible as
18 a statement by an opposing party, stands in isolation and
19 is not causally linked to Mr. Aguila’s participation in the
20 library meeting. The same goes for the alleged
21 telephone call Mr. Aguila received from Marin after Mr.
22 Aguila had moved to California. In that call, Marin
23 purportedly told Mr. Aguila that “I know that you’re in
24 San Diego, California, take care of yourself. Hopefully
25 God will help you.” It is just as likely that alleged overt
26 and subtle threats made by Marin directly to Mr. Aguila
27 were linked to Marin’s alleged interactions with Mr.
28 Aguila well before the library meeting and which, as
noted above, had nothing to do with Title VII “protected
activity.”

(ECF No. 256 at p. 18).

21 In its summary judgment order, the court did not discuss another post-
22 meeting statement allegedly made by Juan Marin to Aguila on or about February
23 12, 2010, two days after the February 10 library meeting, and one day after the
24 alleged threat conveyed to Aguila by Alberto Sanchez. According to Aguila in his
25 declaration filed in advance of the preliminary injunction hearing in CV-10-3033-
26 LRS (ECF No. 9-4 in CV-10-3033-LRS, Paragraph 20) :

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1 Juan Marin called me on or about February 12, 2010 and
2 asked me if I had talked to Alberto Sanchez. He also
3 offered me work at the apartments and money if I told
him what was happening at the meetings. I also told the
EEOC about this call.

4 Plaintiffs do not contend this statement by Marin constitutes a threat in itself,
5 but contend that coming a day after Sanchez's call to Aguila, constitutes
6 confirmation that Marin was part of the "they" Sanchez referred to as knowing that
7 pictures had been taken and threatening to get even with those who attended the
8 meeting and cooperated with the EEOC. In other words, Plaintiffs contend it
9 constitutes independent evidence which establishes the existence of a conspiracy,
10 that Marin was part of it, and that Sanchez's statement was made in furtherance of
11 it.

12 Marin's February 12, 2010 statement is insufficient to establish by a
13 preponderance of evidence that he was engaged in a conspiracy to retaliate against
14 those who attended the library meeting and cooperated with EEOC. While Marin's
15 statement seemingly corroborates Sanchez's earlier statement about providing
16 Aguila money and work for reporting on what was happening at the meetings, it
17 does not corroborate that Marin agreed Sanchez should threaten meeting
18 participants and that he was part of a conspiracy with Sanchez to retaliate against
19 those participants. Plaintiffs acknowledge that Marin's statement by itself does not
20 constitute a threat against anyone, but an offer of work in exchange for
21 information.

22 With regard to Marin's later alleged statements to Aguila ("told me . . . I
23 should never betray him . . . you know what I'm capable of; I can kill you" and "I
24 know that you're in San Diego, California, take care of yourself. Hopefully God
25 will help you"), while these constitute explicit or implicit threats, there is nothing
26 to causally link them to Aguila's participation in the library meeting unless Mr.
27 Sanchez's earlier statements (February 11 and March 8, 2010) are admitted into
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1 evidence as co-conspirator admissions. This is so, even assuming that Aguila's
2 participation in that meeting amounted to engagement in Title VII "protected
3 activity." As the court stated in its summary judgment order, "[b]ecause the
4 statements made by Mr. Sanchez are inadmissible, [these] alleged statement[s] by
5 Marin, which [are] admissible as . . . statement[s] by an opposing party, stand[] in
6 isolation and [are] not causally linked to Mr. Aguila's participation in the library
7 meeting."

8 In *Smith v. Bray*, 681 F.3d 888 (7th Cir. 2012), a discharged African-
9 American employee brought an action against his former supervisor (Bianchetta)
10 and the manager of his employer's human resources department (Bray), alleging
11 under 42 U.S.C. Section 1981 that he was subjected to racial discrimination and
12 retaliation. The plaintiff argued that Bray and Bianchetta conspired to retaliate
13 against him after he complained about discrimination. When Bianchetta learned
14 the plaintiff had retained a lawyer, he told the plaintiff that getting a lawyer was
15 "the worst f***ing thing you can do," that he would "let Denise [Bray] know that
16 you have a lawyer," and that "we're going to deal with you from here on, from this
17 point on. You're going to be sorry. You're going to regret this." Later, on another
18 occasion, the plaintiff called Bianchetta to explain his absence from work and that
19 he was going to pursue a medical leave. Bianchetta responded that "ain't nothing
20 wrong with you and you're faking it, and Denise [Bray] and I already know, you
21 won't be coming back." During his absence from work, the plaintiff also called
22 Bray, who told him that "if Jim [Bianchetta] is not going to talk to you[,], I'm not
23 going to talk to you."

24 The question facing the Seventh Circuit was whether the plaintiff identified
25 any admissible evidence substantiating the existence of a conspiracy outside of
26 Bianchetta's "we're-gonna-get-you" hearsay statement itself. The circuit observed
27 that plaintiff's best evidence on this point was what Bray had told him after he
28

repeatedly called and paged her during his leave to talk about his health insurance: “Well, I’m not going to discuss this, and I told you before that if Jim [Bianchetta] is not going to talk to you[,] I’m not going to talk to you.” While this testimony was admissible against Bray as a statement by a party opponent, Fed. R. Evid. 801(d)(2)(A), the Seventh Circuit concluded it was insufficient to show that Bray conspired with Bianchetta to retaliate against plaintiff for his complaints of discrimination. In other words, it was insufficient to deem Bianchetta’s statement as non-hearsay, admissible as a co-conspirator admission pursuant to Fed. R. Evid. 801(d)(2)(E). According to the Seventh Circuit:

Bray’s refusal to talk with [plaintiff] falls short of proving that she was aware of any unlawful motive of Bianchetta’s. It may show some concert of action between Bianchetta and Bray, but it does not indicate that they shared a common unlawful motive.

681 F.3d at 905.

Juan Marin’s February 12, 2010 statement to Aguila “falls short” of proving that he (Marin) was aware of “any unlawful motive” of Sanchez’s related to the library meeting as may have been conveyed in Sanchez’s February 11 statement to Aguila. Marin’s statement “may show some concert of action” between he and Sanchez- offering Aguila work and money for information about such meetings- but it does not indicate they “shared a common unlawful motive”- threatening to get even with meeting participants who cooperated with the EEOC.

3. State of Mind (Hearsay Exception)- Fed. R. Evid. 803(3))

While Sanchez’s statement may show his state of mind, it does not indicate that Marin shared that state of mind (that he too intended to get even with meeting participants). Plaintiffs simply presume Sanchez’s statement reveals Marin’s state of mind: “Sanchez’s . . . threats are also admissible to show his intent to assist Juan Marin and at least Sanchez’s, if not their collective motive, to monitor and

1 chill protected activity. Sanchez's statement that he and Juan Marin were aware
2 of the meeting and had photographs of those in attendance does go to show
3 Sanchez's knowledge that the claimants were engaging in protected activity"
4 Rule 803(3) applies only to a statement describing a state of mind of the declarant
5 and "does not authorize receipt of a statement by one person as proof of another's
6 state of mind." *Hong v. Children's Memorial Hospital*, 993 F.2d 1257, 1265 (7th
7 Cir. 1993).

8 While Fed. R. Evid. 803(3) is of no assistance to Plaintiffs in establishing a
9 retaliation claim against Marin due to the fact Sanchez's statement is not reflective
10 of Marin's state of mind, the statement is reflective of Sanchez's state of mind and
11 can be offered against Evans Fruit for the truth of the matter asserted- that pictures
12 had been taken of the participants at the library meeting and that Sanchez
13 threatened to get even with those participants. The court agrees with Plaintiffs that
14 "Sanchez's . . . threats are . . . admissible to show . . . **at least Sanchez's** . . . motive
15 to monitor and chill protected activity." (Emphasis added). Evans Fruit contends
16 Sanchez's statements do not reflect his state of mind, but are offered to prove the
17 truth of the matter asserted. This does not make any difference. The 803(3)
18 exception recognizes the statements are being offered for the truth of the matter
19 asserted (in other words, they are hearsay), but makes them admissible anyway
20 because of what are considered circumstantial guarantees of trustworthiness.

21 22 **V. CONCLUSION**

23 The court will not reconsider awarding summary judgment to Evans Fruit
24 and the Marins on the retaliation claims of the claimants other than Gregorio
25 Aguila. To establish the causal link between their participation in the library
26 meeting (the protected activity) and the adverse action (presence of Cuenca and
27 Rojas in the library), they rely on what Aguila or counsel or someone else told

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1 them about Alberto Sanchez making a threat against them. In other words, Aguila
2 or counsel or someone else repeated Sanchez's alleged threat to these claimants.
3 This is inadmissible second level hearsay for which no exemption or exception
4 applies.

5 The court will not reconsider awarding summary judgment to the Marins on
6 the retaliation claim of Gregorio Aguila. Alberto Sanchez's alleged threats
7 conveyed to Aguila are: 1) not verbal acts vis-a-vis Marin because they are offered
8 for the truth of the matter asserted (that Marin was part of the "they", "the people,"
9 making the threat); 2) not admissions by a party opponent (not admissions by an
10 agent of Marin or admissions by a co-conspirator); and 3) not reflective of Marin's
11 state of mind. Summary judgment for the Marins on the WLAD claims of all
12 claimants is reaffirmed and Plaintiffs-Intervenors have already conceded that Title
13 VII claims cannot be maintained against the Marins.

14 Summary judgment for Evans Fruit on the Title VII and WLAD retaliation
15 claims of all claimants is reaffirmed, with the exception of Gregorio Aguila's Title
16 VII and WLAD claims against Evans Fruit. The court reconsiders awarding
17 summary judgment to Evans Fruit on the claims of Gregorio Aguila to the extent
18 they are based on what Alberto Sanchez allegedly said to Aguila following the
19 library meeting. Evans Fruit's liability, if any, depends on whether Sanchez's
20 conduct- not Juan Marin's conduct- can properly be imputed to Evans Fruit.
21 Sanchez was a crew leader for Evans Fruit at the time he allegedly made the
22 statements to Aguila. In the sexual harassment case, CV-10-3033-LRS, a jury
23 found that Evans Fruit crew leaders were not supervisors for whose conduct Evans
24 Fruit could be found vicariously liable under Title VII. (ECF No. 982).¹¹ If this
25

26 ¹¹ Even if Sanchez was a supervisor, there would be no vicarious liability
27 under the WLAD. (ECF No. 741 in CV-10-3033-LRS at p. 3).

1 finding has preclusive effect in this retaliation case and Sanchez was a mere co-
2 worker, it may be necessary for Aguila to prove that Evans Fruit supervisors or
3 members of management had actual or constructive knowledge of his alleged
4 retaliatory behavior and condoned, tolerated, or encouraged the same. *Hawkins v.*
5 *Anheuser-Busch*, 517 F.3d 321, 347 (6th Cir. 2008).

6 Evans Fruit's summary judgment motion sought a determination as a matter
7 of law that it cannot be held liable for punitive damages.¹² The court withholds
8 such a determination pending Aguila's presentation of evidence at trial and
9 whether Evans Fruit is found liable for any retaliation by Sanchez. The court
10 anticipates an initial liability phase of the jury trial to be followed, if necessary, by
11 a damages phase before the same jury.

12 Plaintiffs' Joint Motion For Reconsideration Of Order Re Summary
13 Judgment Motions (ECF No. 279) is **GRANTED in part and DENIED in part**
14 as set forth herein. The Judgment filed April 19, 2013 (ECF No. 257) is
15 **VACATED**. Evans Fruit's "Petition For An Award Of Its Reasonable Attorney's
16 Fees And Costs Pursuant To 42 U.S.C. §2000e-5(k) and Rule 54(d)" (ECF No.
17 262) is **DISMISSED** as moot.

18 19 **VI. RULE 54(b) CERTIFICATION**

20 Pursuant to Fed. R. Civ. P. 54(b), the court may direct entry of a final
21 judgment as to one or more, but fewer than all, claims or parties if the court
22 expressly determines there is no just reason for delay. The court hereby **DIRECTS**
23 the District Executive to enter a final judgment in favor of Defendant Evans Fruit
24 and Defendants-Intervenors Marins on the claims of Aurelia Garcia, Wendy
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26 ¹² Aguila is precluded from recovering compensatory damages. (ECF No.
27 176).

1 Granados, Ambrocio Marin, Cirilo Marin, Angela Mendoza, Francisco Ramos,
2 Elodia Sanchez, Gerardo Silva and Norma Valdez, and in favor of Defendants-
3 Intervenors Marins on the claims of Gregorio Aguila.

4 There is no just reason for delay in entering this judgment as it will allow for
5 an immediate appeal of the summary judgment rulings in favor of Defendant and
6 Defendants-Intervenors on the aforementioned claims which comprise the
7 overwhelming majority of the claims (and claimants) in this case. These claims are
8 severable from Aguila's claims against Evans Fruit based on alleged imputable
9 conduct by Sanchez, and sufficiently factually and legally distinct from Aguila's
10 claims against Evans Fruit. It appears that immediate review of these claims will
11 not result in subsequent duplicative proceedings on appeal. Immediate review of
12 these claims is likely to result in resolution of issues affecting how any eventual
13 trial is conducted (i.e., admissibility of certain evidence and whether a claimant is
14 allowed to recover compensatory damages should liability remain a possibility¹³).
15 Immediate review to determine if this court has correctly narrowed the number of
16 triable claims is clearly more efficient than proceeding with a jury trial solely on
17 Aguila's claims against Evans Fruit when the possibility remains that an additional
18 trial will have to be conducted should the Ninth Circuit Court of Appeals
19 eventually find this court improperly awarded summary judgment on other claims.

20 Pending the Ninth Circuit's concurrence that Rule 54(b) certification is
21 appropriate and if so, the outcome of an appeal, trial of Aguila's claims against
22 Defendant Evans Fruit is hereby **STAYED**.

23 ///

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25 ¹³ It appears the issue of recovery of compensatory damages will also be
26 presented as an issue on appeal in the sexual harassment case, CV-10-3033-
27 LRS.

1 **IT IS SO ORDERED.** The District Executive is directed to enter Judgment
2 as set forth above, and forward copies of the same and this order to counsel of
3 record.

4 **DATED** this 21st day of August, 2013.

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6 *s/Lonny R. Suko*

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8 LONNY R. SUKO
9 United States District Judge
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